Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

WILLIE C. RANDALL, Major,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court correctly granted the Defendant's Motion to Dismiss, or in the Alternative Summary Judgment?

A. Whether the Fourth Circuit Court of Appeals properly affirmed the district court's holding that the Petitioner's claim was for Equitable Relief only and therefore were Non-Justiciable?

B. Whether the Fourth Circuit Court of Appeals properly affirmed the district court's holding that the Army Board for Correction of Military Records (hereinafter ABCMR's) actions were not arbitrary and capricious?

II. Whether the Fourth Circuit Court of Appeals properly affirmed the district court dismissal of the Petitioner's claim under Title VII for lack of subject matter jurisdiction?

III. Whether the district court properly found that the Petitioner was not entitled to relief under the Tucker Act?

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The opinion of the court of appeals was by published per curiam opinion. The opinion of the district court was an unpublished per curiam opinion.

JURISDICTIONAL STATEMENT

This action was brought against the United States of America and certain of its agents pursuant to 28 U.S.C. § 1291. The case eventually proceeded to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court by its published per curiam opinion on September 10, 1996. Time to file this petition for writ of certiorari was extended to and including January 8, 1997.

The Petitioner now, after having been heard by the United States Court of Appeals for the Fourth Circuit hereby petitions this Honorable Court for a Writ of Certiorari. Jurisdiction of the United States Supreme Court is proper pursuant to 28 U.S.C. § 2101(c).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1346(a)(2) provides that:

> "[a]ny other civil action or claim against the United States, of exceeding Ten Thousand ($10,000.00) Dollars in amount, founded either upon the Constitution, or of Congress, or any regulation of an executive department, or any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United

States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978...."

STATEMENT OF THE CASE

The Petitioner is a former United States Army Major of the Quartermaster Corps, forced into retirement based upon the prior holdings in this case. His plight is symbolic of the dilemma which exist throughout the services. He was commissioned in the United States Army Reserve on May 9, 1976 upon completing the Reserve Officer Training Corp (ROTC) and graduating from Virginia State University.

The Petitioner was promoted to First Lieutenant on August 29, 1978. He was later promoted to Captain on September 15, 1980, and to Major on January 1, 1988. He received his appointment to the regular Army by the President of the United States and confirmed by the United States Senate on November 10, 1982.

The Petitioner has received several military awards. Among these awards are: The Army Commendation Medal (ARCOM), with 1st Oak Leaf Cluster (OLC); the Meritorious Service Medal (MSM) with 1st OLC; Southwest Asia Medal with two Bronze Stars; Kuwait Liberation Medal and Bronze Star Medal; and Army and Australia Parachutist Badges. Major Randall is currently assigned to the Special Operations Command, Support Command, Fort Bragg, North Carolina.

The Petitioner is a Gulf War veteran that has had a distinguished military career. His career had been moving upwardly and from all indications and information made available to him, his potential for promotion was at worst, equal with his contemporaries. Much to his surprise, Lieutenant

Colonel James M. Colvin, Jr., Chief, Quartermaster Branch, United States Army, Total Army Personnel Command (PERCOM), notified the Petitioner that "[his] potential rating [was] below average compared to [his] contemporaries. LTC Colvin further expressed that the rating reflected on the senior rater's profile could "have a serious impact on [the Petitioner's] potential for promotion." After receiving this letter, Major Randall visited the Quartermaster Branch on July 31, 1991 to review his military record and to gain a full and complete understanding of LTC Colvin's references. This was necessary because the adverse ratings were never disclosed nor discussed with him by the raters or senior raters.

Upon reviewing his records, the Petitioner discovered three (3) OER's that in his assessment reflected inaccurate information. The Quartermaster Major's assignment officer further advised that the OERs were adverse ratings because the OERs were below center mass and that the Petitioner would be a possible non-select for Lieutenant Colonel. The rating contained in block VIIa, the potential portion of the OERs, was inconsistent with the comments in block VIIB, the performance portion of the OERs. Upon discovering the adverse ratings, the Petitioner promptly appealed the OERs.

OERs #1 and #2 were denied by the Army Board for the Correction of Military Records (ABCMR) because the board stated that the application did not have sufficient evidence and the application was not filed in the prescribed time limit under 10 U.S.C. § 1552(b). The ABCMR further stated:

> "The applicant has not shown that the contested OER should have been referred. Although he claims that the OER was the basis for his non-selection for promotion to LTC, this is speculation on his part, since promotion boards did not reveal the basis for

> non-selection. Nonetheless, it is noted that the applicant was also rated below center mass on two earlier OERs when he served in command positions."

During the rating period for OERs #1 and #2, the Petitioner was the only African American Quartermaster Officer in Command of a Transportation Unit in the Brigade. His senior rater in Part VIIb of OER #1 the following quote:

> "CPT. Randall has performed in an outstanding manner as a company commander of a Headquarters company. He has had to deal with his peers as well as his superiors to facilitate communication between post directors and cadre personnel and improve normal company activities. The functions that he performed require broad understanding of staff procedures and operational requirements so that proper mandatory training may be scheduled lessening any impact on normal staff section operations. CPT. Randall has significantly improved his soldiers quality of life programs ensuring better trooping conditions and unit moral. CPT. Randall is an aggressive, highly capable officer who has displayed potential for advancement to positions of greater responsibilities. Promote to Major and select for CGSC."

After writing laudatory comments on Petitioner's performance and potential, the rater gave the Petitioner the lowest rating in his profile without any explanation. Furthermore, there were no formal counseling statements or

records to show that the Petitioner did not meet the unit's standard.

In OER #2 the senior rater wrote:

> "CPT. Randall has demonstrated a high degree of professional competency in the execution of all of his duties. As a Headquarters Company Commander he has been faced with the difficult task of meeting the high standard set by the Brigade, as well as the diverse needs and goals of a major installation headquarters enhancing the day to day operation of his unit. CPT Randall was also able to maintain a balance of priorities to meet both Brigade and Headquarters staff requirements - a feat which required exceptional ability. CPT Randall is capable of handling tough assignments with competence and should be promoted to Major and selected for attendance at C&GSC."

Later, the ABCMR denied the Petitioner's request for correction of OER #3 on the basis that the Petitioner failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice. However, the Petitioner provided the following supportive evidence: (1) a signed, sworn statement; (2) ten (10) signed letters of support; (3) a copy of the narrative from the Bronze Star Medal; (4) DA Form 67-8-1; (5) a letter from the Quartermaster Branch Chief stating that the OER would impact the Petitioner's career; and (6) the Bronze Star Medal for Meritorious Service in a Combat Zone.

The third OER contained contradictory comments as on the

first two OERs. The rater, LTC Williams, made the following statements about the Petitioner in OER #3:

> "Major Randall has performed his duties in an outstanding manner. He is experienced, fearless, forward looking and a sincere officer, all qualities that have greatly enhanced his performance. As the responsible officer for the management of troop support material, he consistently supervised his personnel to meet requirements of over 4.3 million short tons of food, POL, ammunition and repair parts during XVIII Airborne Corps Command Post Exercises. He accomplished this feat while supporting garrison, meeting or exceeding all DA performance standards. Major Randall brought my initial team into Saudi Arabia; he was selected because of his keen sense of tactical operations. He was the key figure in establishing support to the XVIII Airborne Corps' soldiers from a bare base environment. Key example was his establishment of the Central Receiving Point, and warehouse operations while processing 100,000 requisitions. In concert with his mission, he was the unit's forward commander of 68 soldiers for the first sixty days. In this capacity, he secured a work site requiring complex communications capabilities for three management centers. Major Randall is an operator of note who understands how to bridge the time sensitive gap between commander's battle intent and required service support. His forte is supporting the battle. He is the template of

> physical fitness. Assign at the operator level to maximize his talents and experience."

The rater also checked the block indicating that Major Randall should be "promote[d] ahead of [his] contemporaries" and stated "Major Randall has untapped potential, promote and groom for leadership position." In the rater's April 20, 1992, summarized telephone conversation with an unknown OSRB investigator, she stated:

> "...the reason senior rater gave [Petitioner] a below center of mass evaluation is because [Petitioner] and the senior rater had some disagreement on how to implement the commander's intent regarding the initial deployment into Saudi Arabia. The senior rater led the COSCOM advanced party. [Petitioner] was the rater's representative to that advance party. Apparently, once in the country, one of the general officers present at that time had some ideas and demands that [appellant] was jumping to satisfy. The general was not in the rating chain. The senior rater had to remind [Petitioner] that he did not work for that general, but for the senior rater who worked for a different general. The rater said it was one of those kind of situations. [Petitioner] apparently was not fulfilling the senior rater's requirements. The rater anticipated going in with main body, but got called to go over to Saudi Arabia a few weeks early because of [Petitioner]. The rater said when she reported to the senior rater, she asked him what was the hot issue he wanted her to do right away. The senior rater said to get the [appellant]

> back under control because he was not doing what the senior rater was telling him to do. That was the nature of the problem, and it fit the pattern of the problem she had with the [Petitioner]. The rater said that she continued to work with, to mentor and counsel [appellant] and there was some improvement. The senior rater wanted to do another OER, and they did rate him a little higher on the second OER, but they were being generous in doing so."

The commander the rater was referring to was Brigadier General John G. Zierdt, Jr. General Zierdt wrote the following in a letter of support:

> "I support Major Willie C. Randall's appeal of his report for the period of 900101 to 901231. Major Randall is an outstanding officer who has done a great job in the Material Management Center during the past two years that I have been Commander. His initiative and dedication were instrumental to the superb management of troop support material during Operation Desert Shield and Desert STORM. His performance has been outstanding and was critical to our initial success in establishing support for our Corps in Saudi Arabia."

The record shows that the Petitioner arrived in the unit on January 10, 1990. Colonel Williams did not discuss the Petitioner's duties and performance objectives until April 18, 1990 which was over ninety (90) days into the rating period. Furthermore, the rater did not do any follow up counseling with the Petitioner during the period leading up to OER #3.

The senior rater, like the rater made very positive comments about Major Randall's performance. Colonel Garrett, the senior rater noted:

> "[Major Randall] ...is a conscientious, forceful manager. He was an early, driving force in the material management of critical resources for Operation Desert Shield. His dedicated, hard-working efforts helped push supplies and equipment forward to arriving units occupying combat positions in the austere, hostile desert environment of Saudi Arabia. The success of the rapid, massive buildup of forces and their sustainment was largely the result of the strong commitment and dependable support of his material management team and other support units of the 1st Corps Support Command. Demonstrated professional potential."

In an unsworn telephonic conversation with the OSRB, COL. Garrett stated:

> "Major Randall was a knowledgeable, pleasant mannered person who just seemed to think that he knew the best way to get things done. He knew that the rater had continuous trouble with him, because he was prone to take independent action and did not always keep her informed. When they went Saudi Arabia, Major Randall was reporting directly to the senior rater. He found that Major Randall would simply ignore guidance and even specific instructions and strike out and do things on his own, in his own way. The senior rater can remember one time when

> he told him twice what specifically needed to be done, and he ignored it, and even smiled when the senior rater brought him in to talk about it. He said Major Randall was like a loose cannon on deck. The senior rater continued by saying that Major Randall was a person who had some success and made it to the rank of Major and having achieved that degree of success, believed that his way was better."

The Petitioner later requested a reconsideration to the ABCMR on November 16, 1993, and provided several pieces of new evidence. The evidence submitted by the Petitioner included the following:

(1) The original copy of the Petitioner's OER Support Form, DA Form 67-8-1;

(2) Colonel Zierdt was identified as the Petitioner's senior rater on the DA Form 67-8-1 that was initialed by the rater;

(3) The Petitioner assigned as an error that the rater was required to sign Part Va of the final DA form 67-8-1, and the senior rater was required to return the form to the rated officer which did not occur;

(4) Four (4) additional letters from persons that worked directly with the Petitioner during the rated period which attested the Petitioner's performance during the rated period;

(5) A letter from CSM Mosby who had the same experience with the senior rater's evaluation;

(6) A certificate of Achievement from the XVIII Airborne Corps Commander for performance during the same period that the senior rater rated Petitioner performance as below average;

(7) Letters of support from individuals that worked with

the Petitioner. Two (2) of which were from Battalion Commanders;

(8) A report of a survey of a company commander that lost accountability of over One Million ($1,000,000.00) Dollars of government property and was rated in the top block of VIIa of his OER, which is the potential evaluation;

(9) The Quartermaster Assignment's Officer interview sheet in which that Officer stated that Major Randall may be a non-select for promotion because of his OER;

(10) A copy of a memorandum signed by the then Vice Chief of Staff of the Army (now Chief of Staff of the Army), requesting that the President of the 1992 Lieutenant Colonel Promotion Board select a passed over major for Lieutenant Colonel, along with evidence that the officer was promoted;

(11) An Army Times article published on June 21, 1993: "Some Soldiers Challenge the Separation System and Win."

Later, the Petitioner in an effort to exhaust his administrative remedies wrote the Assistant Secretary of the Army, Manpower and Reserve Affairs on June 11, 1993 concerning the ABCMR's Memorandum of Consideration dated March 17, 1993. The Petitioner protested that the ABCMR's decision in denying him requested relief was arbitrary and capricious. Later, John W. Matthews, Deputy Assistant Secretary, Department of the Army Review Board Equal Employment Opportunity Compliance and Complaints, responded for the Assistant Secretary of the Army, Manpower and Reserve Affairs in a letter dated June 30, 1993. He wrote, "your legal challenge to the procedures utilized by the Board is noted... In the absence of any additional action on your part, this letter constitutes final agency action on your submission. Should you seek review of this decision, initiate action in a Federal Court of competent jurisdiction."

To ensure that his administrative remedies were exhausted, the Petitioner submitted a request for reconsideration to the

ABCMR on November 16, 1993 for the remaining OERs. The ABCMR received the request on November 22, 1993. On May 5, 1994, the Petitioner received a letter dated April 28, 1994 from the ABCMR which was signed by Juanita L. Williams for David R. Kinneer, Executive Secretary. Ms. Williams wrote, "Since your original application regarding the OER covering the period January 1, 1990 through December 31, 1990 was previously considered and denied by the Board, favorable action on any request for reconsideration of that application must necessarily be based upon submission of new material evidence of such substance and materiality as might reasonably offer a basis for reversal of the original decision of the Board." After receiving Ms. Williams' letter, the Petitioner wrote the Secretary of the Army in a letter dated July 1, 1994 about the unauthorized actions of the staff of the Correction Board. Although the Petitioner's correspondence was addressed to the Secretary of the Army, the Secretary did not respond. Mr. Kinneer, who is the Executive Secretary of the ABCMR and the supervisor of Ms. Williams, wrote, "Please be advised that I have reviewed the action taken by my staff on April 28, 1994, and consider it to have been appropriate and in keeping with Army Regulation 15-185, the regulation governing the operation of the ABCMR." The Petitioner then filed a complaint in the Federal District Court which gave rise to the current action.

SUMMARY OF THE ARGUMENT

The Fourth Circuit Court of Appeals erred by affirming the district court's dismissal of the Petitioner's cause. Contrary to the overwhelming weight of the authorities, the district court ordered dismissal despite the many factual disputes and allegations that existed between the Petitioner and the Appellees. This in and of itself was error. Furthermore, the court sought to test the weight and sufficiency of the evidence, rather than merely looking for the existence of a dispute, which would have made summary judgement inappropriate.

Interestingly, throughout the district court's opinion, several cases are cited that deal with the Federal Torts Claims Act (FCTA). It was error to apply these standards to the Petitioner' military appeal which sounds other than in tort. Furthermore, many of the cases cited by the district court were not analogous to the Petitioners's case.

Outside the facts that gave rise to this civil lawsuit were two notable errors by the court. First, the court attempted to separate the Petitioners money and equitable claims in support of its nonjusticibility argument. The Petitioner is requesting that his military records be corrected and that he receive back pay for the periods in which his records were inaccurate. In light of the nature of the relief sought, the two claims are inseparable despite the court's attempt to separate them. Hence, the court improperly held that the Petitioner's claim was nonjusticiable.

Another issue presented to the court was whether or not the Army Board for the Correction of Military Records (ABCMR) acted in an arbitrary and capricious manner. The evidence presented in the Petitioner's memorandum of law in support of his opposition to the Government's motion for summary judgement noted several pieces of new evidences that were ignored by the ABCMR. This was contrary to the military regulations that mandate that new evidence be forwarded to the board for determination. The dispositive question however was factual in nature. This question simply stated was whether the facts suggested error in the ABCMRs actions. While the court entertained motions and memorandums on the issue of summary judgement, this was not a mechanism whereby the Petitioner could fully and adequately present his evidence. However, the Petitioner's memorandum did present several genuine issues of material fact. Rather than preparing a brief of fact and law, the Petitioner's memorandum was limited to the facts and issues surrounding summary judgment which was the motion before the lower court.

It is the Petitioner's contention that the lower court did not have the authority to dismiss the Petitioner's case in light of the disputed issues of material fact. A dismissal would have only been proper under summary judgement if there was no dispute as to any genuine issue of material fact, in light of the case law on this issue. The lower court's dismissal of the case on summary judgement ignored the Petitioner's showing of the existence of a dispute as to material facts. The pleadings clearly established factual allegations to which the Government took issue. Therefore, the only facts before the court were disputed facts which should have overcome the Government's ability to prevail on their motion for summary judgement.

This case is also worthy of reversal because of the Petitioner's Title VII claim. The Fourth Circuit has not squarely addressed the issue of whether Title VII applies to the military. It is the Petitioner's position that both Title VII and the provisions of the United States Constitution, as they relate to discrimination, were not intended to be usurped by the interest in maintaining the military, it must be noted that one of the military's most important functions is to preserve the American way of life. Therefore its provisions were intended by congress to apply to its members. Inherent in the American way of life are certain fundamental rights and protections. Among these protections is the ability of all persons to be free from blatant discrimination such as that experienced by the Petitioner.

REASONS FOR GRANTING THE WRIT

The issues before this Honorable Court are such that the moral, discipline and the esprit de corp of the United States Army as well as the other branches of service are affected. This Honorable Court's guidance is necessary to establish uniformity among the several circuits. By addressing the court of appeals' opinion, which the Petitioner maintains was erroneous, this Honorable Court is afforded the opportunity to establish the

much needed precedent for future matters arising under the issues mentioned heretofore.

I. Legislative History and Purpcse of the ABCMR.

The ABCMR was established under the authority of Congress to afforded members of the military to have a mechanism to address errors, omissions or inaccuracies existing within their records. Although this process was made mandatory it was not designed to be exclusive. The federal courts were noted to be the avenue of last resort for one seeking correction of records who felt that the agency had failed in their responsibility to act consistent with their own regulations. It is this process which servicemembers depend upon through its existence to afford them access to the rights and privileges to which they have been deemed entitled.

II. The District Court Incorrectly Granted the Defendants' Motion to Dismiss and for Summary Judgement.

This Honorable Court has held that summary judgment must be entered against a party who fails to establish an essential element of that party's case on which that party will bear the burden of proof at trial. In *Celatex Corp. v. Cantrett*, 477 U.S. 317 (1986), the court stated:

> "In our view, the plain language of Rule 56(c) mandates the entry of Summary Judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact, *'since a complete failure of proof concerning the*

> *non-moving party's case necessarily renders all other facts immaterial.*" *Id.* at 322-23 (emphasis added).

"A court may not resolve disputed issues of fact in ruling on a summary judgment motion, if a question of fact remains, the motion for summary judgment should be denied and the case should proceed to trial." *Felix v. Young,* 536 F.2d 1126 (1976). As alluded to in the Defendants' pleadings, there were several facts to be resolved which the United States has asserted positions contrary to the Petitioner. Among these facts were:

(a) Whether the senior rater's below COM evaluation was an inaccurate and unfair portrayal of his potential;

(b) Whether the senior rater should have referred the Petitioner's OER to him;

(c) Whether there was adequate counseling;

(d) Whether the ABCMR and SRs actions were arbitrary and capricious; and

(e) Whether the Petitioner's due process rights were violated.

Similarly, it appears that the district court had a fair appreciation of the factual dispute despite having granted summary judgment. The district court stated, "Plaintiff argues that his non-promotion stemmed from his three-block rating in his 1992 OER. Plaintiff, however, offers only mere speculation that his rating caused his non-promotion." *See Memorandum of Decision,* Appendix, *infra,* 36a. The court went further to cite the case of *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-249 (1986) in furtherance of the proposition that "the non-moving

party must proffer sufficient evidence on which a reasonable jury could find in its favor" (Memorandum of Decision, Appendix, *infra,* 39a) (citing *Anderson,* 477 U.S. at 248). (J.A.-98).

Applying the standard cited by the court, in order for the Petitioner to have prevailed, he would have only needed to produce evidence which might convince the minds of reasonable jurors. The question then becomes whether a reasonable jury could have found that there existed some problem with the fact that Major Randall's SR on three occasions praised him in one part of his OERs and later gave him totally inconsistent ratings when viewed in light of his comments. Next, the Petitioner would only need produce evidence that would be susceptible of proving that the SRs ratings were a key factor in Major Randall's passover. As a third area of dispute, Major Randall would need only show that based on his prior service records, letters of support and past promotions and accommodations that the SRs actions as well as the ABCMRs were arbitrary and capricious. While Petitioner would only need to show there existed a dispute, it is the position of the Petitioner that any of the aforementioned areas could have reached the minds of reasonable jurors. Inasmuch as the court dismissed this action, the court erred.

III. The District Court Improperly Held that the Petitioner's Claim was for Equitable Relief and was Therefore Non-Justiciable

In the Memorandum of Decision of the district court, the Court recognized the Petitioner's claim as being for promotion to lieutenant colonel or expungement of the rating in his three (3) OERs. The Court further noted that the Petitioner also requested the opportunity to attend advance military schools and compete for the rank of colonel. After outlining the equitable relief sought by the Petitioner, the court found that these claims were non-justiciable and hence the federal court could grant no relief. This decision is antithetical to the precedent of the federal courts.

In *Lane v. Secretary of the Army*, 504 F. Supp. 39 (1980), Joseph Lane sought review of his honorable discharge after being released from military service due to his inability to make rank after being passed over twice for promotion. In his complaint, the Petitioner Lane, alleged violation of his due process and equal protection rights. After reviewing the Petitioner's complaint, the United States District Court found that Lane presented a justiciable claim which was only defeated by the court's analysis of 10 U.S.C.A. § 3303(d).[1] Consistent with the *Lane* court, many courts have cited the standard set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), before summarily refusing to review such claims. According to the *Mindes* court, there is a four tier test to consider when determining the justiciability of military claims. According to the court, these steps are:

---

1. 10 U.S.C. § 3303(d) provides:

> (d) A deferred officer who is not recommended by the next selection board considering officers of his grade and promotion list shall--
>
> (1) if he is eligible, be retired under section 3913 of this title;
>
> (2) if he is not eligible for retirement under section 3913 of this title, but is eligible for retirement under any other provision of law, be retired under that law on the date when he would have been retired under section 3913 of this title if he were eligible; or
>
> (3) if he is not eligible for retirement under section 3913 of this title or any other provision of law, be honorably discharged on the date he would have been retired under section 3913 of this title if he were eligible, with severance pay computed by multiplying his years of service, but no more than 12, computed under section 3927(a) of this title, by two months' basic pay of the grade in which he is serving on the date of his discharge.

> 1. The nature and strength of the Plaintiff's challenge to the military determination. Constitutional claims, are normally more important than those having a statutory or regulatory base...
>
> 2. The potential injury to the Plaintiff if review is refused.
>
> 3. The type or degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when a review is granted, but if the interference would be such as to seriously hinder the military in the performance of vital duties, it militates strongly against relief.
>
> 4. The extent to which the exercise of military expertise or discretion is involved. The court should refer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.

In analyzing the criteria set forth by the *Mindes* court, the Petitioner urges this court to review the federal and district court's actions. The "nature and strength" of Major Randall's claim is founded in the military's refusal to follow its own regulations and also the denial of the petitioner's constitutional rights. *Id.* The Petitioner has exhausted his administrative claim as required and without review from this Court, he has no other avenue to assure that his rights are not violated. Hence, a refusal to review the Petitioner's claim by this Court would be a refusal to guarantee that the Petitioner's constitutional rights are not violated and a message of toleramce of these violations which are both unconstitutional and unacceptable.

This is a situation which offers very limited interference with the military function. If this Court should decide to grant Major Randall the relief sought, there would be no disruption in current military operations. As a matter of fact it would enhance the overall objectives of Congress in allowing court review. This is exactly the type of case that needs to be reviewed by this Court to ensure that the military is following its own regulations.[2] Furthermore, if this Court were to render an opinion, it would aide the military in assuring the smooth and efficient operation of its own agency as there would be a clear mandate from this Court in regards to the Court's interpretation of the military regulations. The opinion of this Court would allow the military to make any appropriate changes in the current regulation. In essence, the Petitioner's suit will aide rather than hinder military functions.

Lastly, while courts have been reluctant to review military decisions on issues dealing with promotions, the court does not allow the military to violate its own policies. Inasmuch as there purports to be some error, the courts will review such action. *See Orloff v. Willoughby,* 345 U.S. 83, 73 S. Ct. 534, 97 L. Ed. 842 (1953); *Byrne v. Resor,* 412 F.2d 774 (3rd Cir. 1969); *Luftig v. McManara,* 126 U.S. App. D.C. 4, 373 F.2d 664 (1967), *cert. denied,* 387 U.S. 945, 87 S. Ct. 2078, 18 L. Ed. 2d 1332 (1967); *Winters v. United States,* 412 F.2d 140 (9th Cir. 1969) *cert. denied,* 396 U.S. 920, 90 S. Ct. 248, 24 L. Ed. 2d 200 (1969). Furthermore, this Honorable Court made it clear to the federal courts that military decisions "are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell v. Wallace,* 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983); *See also Gant v. Binder,* 596 F. Supp. 757 (1984) (holding that there are two exceptions to the no review of military decisions rule which are: (1) allegations that military procedures violate the constitution; or (2) that the military has violated its own regulations.)

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2. *See* discussion *infra,* Section V.

IV. The ABCMR's Actionns were Arbitrary and Capricious

To appreciate the far reaching implications of a decision in the instant case one need onnly review the Army Times Archives through America On Line, l by entering the search terms "Army Board of Corrections of Mililitary Records. There are fifty-one (51) matching entries from aaaccross the United States. The Army Times is a news publicationn with counterparts in each branch of the services hence, the casse presented to the Court by Major Randall is not a new phenommena to the federal court. The United States Court of Claims dealtlt with a similar situation in the case of *Sanders v. United States*, 594 F.2d 804 (1979). In the *Sanders* case, the Court held that thee failure of the Correction Board to void passovers for temporarary promotion which grew from a defective officer effectiveneess report was arbitrary, capricious, without rational basis, andd contrary to the law; and the Air Force's authority to termminate the serviceman was thus improperly exercised. The ccourt further held that the serviceman would be entitled to back paay calculated in accordance with the law; reinstatement to the raank of captain; and that the service secretary would be directeed to remove from the records, all passovers for promotionn to major with an appropriate nonprejudicial explanation pput in the record. *Id. Sanders* like the Petitioner was denied reblief by the Correction Board in the form of correcting an injusstice which was reflected on the officer's effectiveness reportrt. *Id.*

There are several poinnts of reference presented by the Petitioner supporting his clalaim to have his military records corrected. Upon taking a commmon sensical approach to the facts, it is clear that the Petitioner'r's senior raters' rating was unjust because the narrative did not eenmesh with the ratings. The mere fact that the raters' comments s and ratings were so inconsistent, indicates arbitrariness and caapriciousness. To the extent that the ABCMR did not recognize these inconsistencies and grant relief, consistent with it's regulations, their actions similarly were arbitrary and capricious.s.

The Court of Claims in *Yee v. United States*, 512 F.2d 1383, 206 Ct. Cl. 388 (1975) held, "when a military correction board fails to correct an injustice clearly presented in the records, it is acting in violation of its mandate. Such a violation which is contrary to the evidence is arbitrary and capricious." *Id. See also Woodford v. United States*, 151 F. Supp. 925, 138 Ct. Cl. 228, *cert. denied*, 355 U.S. 861 (1957); and *Wales v. United States*, 132 Ct. Cl. 765 (1955). Similarly, the court in *Miggett v. United States*, 603 F.2d 835, 221 Ct. Cl. 171 (1979) held that wrongfully relying on a rater's uncorroborated assessment rises to the level of arbitrariness and capriciousness. *Id.*

The Petitioner offered several letters of support, as well as new evidence for the reviewing board to consider on appeal. However, the board found that there was no evidence in the record which would support any error or injustice. The duty presented to the reviewing board by *Werner v. United States*, 642 F.2d 404 (1981), is to base their decision on a balanced consideration of all the evidence presented and available to it. This would mean that the decision of the board should have been made in accordance with the overwhelming weight of the evidence.

It is very doubtful that the OSRB made a fair decision based on the overwhelming amount of evidence presented by the Petitoner. The only fact known regarding the senior raters disparaging comments is that there is no documentation to support their allegations. Furthermore, the senior raters nor the raters' on either occasion prepared any negative write-ups on the Petitioner nor relieved him of his duties during the rated periods. Hence, the board in its action was seeking to impose a burden upon the Petitioner which he could never meet. In light of the Board's refusal to grant the Petitioner a hearing, the ABCMR's denial of relief was, among other things, arbitrary and capricious. In looking at the substantive and procedural due process considerations, one such procedural consideration

is found in AR 15-185 which outlines the procedure that the military boards are to follow. It states:

> "When an original application...is denied without a hearing, the board's determination will be made in writing and will include a brief statement of the grounds for denial...[which] will include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations rejected, together with all essential facts upon which the denial is based...[3]
>
> ...When the Board has completed its proceedings, a record thereof will be prepared...The record will include...the findings, conclusions and recommendation of the Board..."[4]

The ABCMR's "record of proceedings", did not contain "findings, conclusions and recommendations" as the governing regulation required; it also did not comply substantively or procedurally with the above requirements in AR 15-185; and was nothing more than rationaless reasons to deny the Petitioner's appeal.

Also offered as a reason for reviewing the Petitioner's request for relief was the fact that the Army ignored the provisions of AR 623-105 by not referring the adverse OERs to the Petitioner. The Petitioner offered the opinion that the senior rater knew or should have known that the negative ratings would

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3. § 10, AR 15-185

4. § 19, AR 15-185

have an adverse impact on the rated officer's career. While the court below opined that the senior rater may not have felt that the ratings were adverse, this is contrary to what two other officers concluded after reviewing the disputed OERs. Furthermore, the litmus test established by the court is whether "the rating is low or compares unfavorably with those of his peers and is fatal to his chances of selection." *Skinner v. United States*, 594 F.2d 824, 831, 219 Ct. Cl. 322, 334 (1979).

According to the Court in *Harry v. United States*, 618 F.2d 701, 223 Ct. Cl. 10 (1980), "Courts should give less deference to the Board's conclusions if such conclusions are reached without reasoned explication." It is clear from all of the facts stated heretofore that no compelling reasons were given for the denial of the Petitioner's claim. At the very least, the Petitioner should have been given a hearing to further explore the evidence which he presented. In support of this argument, the Petitioner offered the wisdom of the Correction Board legislation passed by Congress in 1946.

Not only were there problems in the decision made by the ABCMR, but also with the composition of the panel and its inaction. Rather than the Secretary making the determination of whether the Petitioner's military records should have been corrected, a member of the ABCMR staff appeared to have unilaterally made the decision. From all indicators, it appears that the panel did not have any input in the staff member's decision to deny the Petitioner's requested relief. However, the overwhelming weight of federal authorities suggest that the Board, when obligated to, must act and must not participate in "meaningless formalities." *Clackum v. United States*, 148 Ct. Cl. 404 (1960).

A plain reading of 10 U.S.C. § 1552(a)(1) makes it abundantly clear what the Secretary's duties are: the aforementioned provision provides the Secretary with the

authority "under procedures established by [him]", which "must be approved by the Secretary of Defense", and "acting through boards of civilians of the executive part of that military department", to correct any military record of the Army "when the Secretary considers it necessary to correct an error or remove an injustice". In furtherance of the congressional intent is 10 U.S.C. § 3013(f), providing in part, ..." the Secretary of the Army may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army". Contrary to the obvious action that was taken in the case at bar, there is no statutory authority whereby the Secretary's authority under 10 U.S.C. § 1552 (to take final action on an applicant's request for relief) may be channeled to a person lower than an Assistant Secretary of the Army. Likewise, it is clearly violative of the authorities set forth heretofore for such authority to be delegated to the Executive Secretary of the ABCMR.

Section 10 U.S.C. § 1552 gives the authority to correct the record to the Secretary of the Army. In *Proper v. United States*, 145 F. Supp. 317, 139 Ct. Cl. 511 (1957), the Court of Claims held that the Secretary could overrule the recommendations of the Correction Board where the findings of that Board are not justified by the record. What the *Proper* case did not do is vest any authority in Boards for the correction of military records to determine whether to deny a request for correction of military records under 10 U.S.C. § 1552 (which clearly rests in the Secretary and not in the Board). To the extent that the Board took such action without any Secretarial review and approval, the Board's action was improper and void *ab initio*.

Even in the worse scenario, if this Court would find that the Board acted properly, this Court should reasonably hold that the Board's actions were clearly taken without having given proper consideration to the substantial and compelling evidence offered by the Petitioner. To the extent that the Board refused

to fairly evaluate the strength and weight of the Petitioner's new evidence, this Court should review such arbitrary and capricious actions of the reviewing board through granting the Petitioner's writ.

V. The District Court Erred in not Reviewing the Petitioner's Title VII Claim

The district court cited the case of *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1990) in support of its opinion that uniform members of the Armed Services cannot recover under Title VII. The court properly notes that while several circuits have passed on this issue, the Fourth Circuit has not addressed this particular issue. Hence, the Fourth Circuit Court of Appeals has failed to establish a rule for the district to follow. This Court through granting the requested writ will set the standard on this issue for the country.

In support of the Petitioner's contention that Title VII should apply, the Petitioner's offer the case of *Able v. United States*, 863 F. Supp. 112 (E.D.N.Y. 1994). In *Able* six (6) military officers who identified themselves as homosexuals brought suit in federal court challenging the constitutionality of the statutes and regulations of the military. *Id.* Among other constitutional claims, the Plaintiffs sought relief because of the vagueness of the military regulation as well as a violation of their constitutional rights. The Plaintiffs argued that the regulations of the military violated their first and fifth amendment rights and that as such, the Plaintiffs should be guaranteed their constitutional rights. The court in this case held that the Claimants stated a cause of action for a violation of their equal protection rights and that the Claimants stated a cause of action for a violation of their freedom of expression rights. This case is very important for two (2) reasons, to wit:

(1) The case recognizes that members of the military service should not be denied their constitutional rights.

(2) That a claimant can properly state a cause of action for violation of their equal protection rights.

The Petitioner in the case at bar, sets forth a claim for violation of his Title VII rights. Title VII and the equal protection clause of the United States Constitution both seek to ensure that persons are not discriminated against because of some constitutionally prohibited classification. Major Randall falls within one (1) of the classifications that has long been recognized as a protected class under the United States Constitution. Major Randall in performing his duties was the only African American Quartermaster Officer in command of a Transportation Company.

If this Court is to find that service members have constitutional rights, it should similarly hold that Title VII does apply to members of the military, as both the equal protection clause of the United States Constitution and Title VII seek to prevent discrimination and unconstitutional classifications.

To argue that the military is not subject to the United States Constitution and federal law, is to argue that the military is a separate branch of government. The United States Constitution provides for the legislative, executive and judicial branches of government. At no point in the constitution is there a provision for the military branch of government. In light of the foregoing, it would appear that Major Randall's well defined constitutional rights would prevail over any interest in military functions.

CONCLUSION

For all the foregoing reasons, this Honorable Court should grant certiorari.

Respectfully submitted,

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Dated: January 8, 1997

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED MAY 7, 1996

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2504

WILLIE C. RANDALL, Major,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; THE UNITED STATES ARMY CLAIMS SERVICE; TOGO D. WEST, JR., SECRETARY OF THE ARMY; DAVID R. KINNEER, EXECUTIVE SECRETARY, Army Board for Correction of Military Records; DEPUTY CHIEF, Appeals and Corrections Branch; OFFICERS, Special Review Board (OSRB); REINARD M. LOTZ, Colonel; STEPHEN GARRET, Colonel; ORA J. WILLIAMS, Lieutenant Colonel,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree Jr., Senior District Judge.
(CA-94-866-5-D)

Argued: May 7, 1996

Decided: September 10, 1996

Before WILKINSON, Chief Judge, ERVIN, Circuit Judge, and CHAPMAN, Senior Circuit Judge.

Appendix A

Affirmed by published opinion. Senior Judge Chapman wrote the opinion, in which Chief Judge Wilkinson and Judge Ervin concurred.

COUNSEL

ARGUED: Clifford Leon Lee, II, THE LEE LAW FIRM, P.A., Fayetteville, North Carolina, for Appellant. Bruce Charles Johnson, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Janice McKenzie Cole, United States Attorney, Eileen C. Moore, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION

CHAPMAN, Senior Circuit Judge:

Plaintiff-Appellant, Willie C. Randall, a Major in the United States Army, filed this action after he was denied promotion to the rank of Lieutenant Colonel. Plaintiff alleges that his nonselection was the result of racial discrimination, that he was denied due process, and that the Army failed to follow its own regulations in reviewing his request for correction of his military records. The district court granted Defendants' motion to dismiss or, in the alternative, for summary judgment, and Plaintiff appealed. For the reasons that follow, we affirm.

I.

Plaintiff is a United States Army Major in the Quartermaster Corps and is currently stationed at Fort Bragg, North Carolina. He was originally commissioned in the Army Reserve on May 9, 1976, after completing the Reserve Officer Training Corp (ROTC) Program and graduating from college. He was promoted

to First Lieutenant on August 29, 1978, and to Captain on September 15, 1980. He received an appointment to the regular Army from the President and was confirmed by the Senate on November 10, 1982. On January 1, 1988, he was promoted to the rank of Major. By all accounts, Plaintiff has had a distinguished military career. He has continued his formal education while in the Army, has received several military awards, and served with distinction in Saudi Arabia during Operations Desert Shield and Desert Storm.

Plaintiff anticipated being promoted in due course to the rank of Lieutenant Colonel. On May 16, 1991, however, he received a letter from Lieutenant Colonel James M. Colvin, Chief of the Quartermaster Branch of the United States Army, indicating that Plaintiff's 1990 Officer Evaluation Report ("OER") might present a problem for his continued promotion. LTC Colvin stated that the rating for potential in Plaintiff's 1990 OER "is below average compared to [his] contemporaries" and that "a continuation in this direction may have a serious impact on [his] potential for promotion." S.A. at 289.

In response to LTC Colvin's letter, Plaintiff visited the Quartermaster Branch on July 31, 1991 to review his military records to determine the source of the unfavorable material referred to by LTC Colvin. When Plaintiff reviewed his records, he discovered that his OER for the period from January 1, 1990 to December 31, 1990 contained an unfavorable rating of his potential.[1] Plaintiff also discovered two additional OERs that reflected similar unfavorable ratings of his potential. Those

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1. Part VII(a) of the OER contains nine vertical blocks on which the senior rater assesses the ratee's potential by placing a mark in one of the blocks. AR 623-105, ¶ 4-16(d)(1) (Mar. 31, 1992), S.A. at 358. On Plaintiff's

(Cont'd)

OERs rated Plaintiff from May 5, 1982 to May 9, 1983 (OER #1) and from May 10, 1983 to November 16, 1983 (OER#2). Plaintiff believed that all three OERs contained inaccurate ratings of his potential because the ratings were arguably inconsistent with the written comments contained in another part of the OER.[2]

On November 27, 1991, Plaintiff filed an appeal of his 1990 OER to the Officers Special Review Board ("OSRB"). He sought to upgrade his potential rating or to expunge that portion of the OER from his records altogether. In addition, on December 12, 1991, Plaintiff appealed OERs #1 and 2 to the OSRB. He sought the same relief for OERs #1 and 2 that he sought for his 1990 OER, and he requested that the OSRB waive the time limitation in 10 U.S.C.§ 1552(b)[3] for the earlier OERs.

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1990 OER, the third block is marked with an "X." J.A. at 129. Although this selection is in the top third of the nine possible blocks, it reflects an unfavorable rating when compared with the senior rater's profile, which measures how that particular officer rated the other individuals he is responsible for rating. *See* AR 623-105, ¶ 4-167(d)(5), S.A. at 358. Plaintiff's three-block rating is below center of mass, or below average, on the senior rater's profile, because, of the nineteen officers rated by that particular senior rater, twelve received a two-block rating for potential, six (including Plaintiff) received a three-block rating, and one received a four-block rating. J.A. at 129.

2. Part VII(b) of the OER contains a space for the senior rater to provide written comments about the ratee. That portion of the OER can include either an explanation of the potential evaluation in Part VII(a), or it can be an assessment of the ratee's actual performance. AR 623-105, ¶ 4-16(d)(2), S.A. at 358.

3. Section 1552(b) of Title 10 of the United States Code provides that a claimant may seek to correct his military records "within three years after

(Cont'd)

Appendix A

In support of his appeal of OERs #1 and 2, Plaintiff submitted to the OSRB supporting statements from several of his superior officers and some newspaper clippings highlighting his accomplishments. The OSRB did not deem it necessary to contact the senior rater who completed the OERs in question. Although the OSRB waived the statute of limitations as to OERs # 1 and 2, it nevertheless denied Plaintiff's appeal. According to the OSRB, Plaintiff "failed to provide clear and convincing evidence that supports his contention that the contested OERs are inaccurate." S.A. at 130.

The OSRB reached essentially the same conclusion with respect to Plaintiff's 1990 OER. In support of that appeal, Plaintiff again submitted favorable testimonials from several of his contemporaries and superior officers, as well as a certificate and citation for the award of the Bronze Star Medal he received from his service in the Gulf War during the rated period. The OSRB conducted a thorough investigation and interviewed the rating officials who completed Plaintiff's 1990 OER. The

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(Cont'd)

he discovers the error or injustice." 10 U.S.C. § 1552(b). That section further provides that a Board for the Correction of Military Records "may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice." *Id.* Although this court need not address the applicability of this limitations period to this case, there is some debate about whether this statute of limitation is tolled during a service member's period of active service by the Soldiers' and Sailors' Civil Relief Act of 1940 ("SSCRA"), 50 U.S.C. § 525. *Compare Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994) (holding that tolling provision in SSCRA tolls three-year limitations period in 10 U.S.C. § 1552(b) during service member's period of active duty; but that the equitable defense of laches may still prevent review), *with Miller v. United States*, 29 Fed. Cl. 107 (1993) (holding that SSCRA does not toll limitations period of 10 U.S.C. § 1552(b)).

intermediate rater indicated that she had problems getting Plaintiff to follow her directions and that Plaintiff seemed to think he knew the best way to get things done. In addition, the senior rater stated that Plaintiff was "like a loose cannon on deck." S.A. at 144. The OSRB concluded that Plaintiff "failed to provide clear and convincing evidence that supports his contention that the contested OER is inaccurate and unjust and does not adequately reflect his performance or potential." S.A. at 146. Accordingly, the OSRB denied Plaintiff's appeal.

Plaintiff was denied promotion to Lieutenant Colonel on August 6, 1992.

Thereafter, he appealed the decision of the OSRB as to all three of his OERs to the Army Board for the Correction of Military Records ("ABCMR"). He requested that all three OERs be upgraded to reflect a center of mass rating for potential or, in the alternative, that the potential evaluation be deleted entirely from each report. In addition, he requested that his records be corrected to reflect that he was selected for promotion to the rank of Lieutenant Colonel by the 1990 promotion selection board.

On March 17, 1993, the ABCMR issued two memoranda of consideration denying Plaintiff's requests. The ABCMR determined that Plaintiff's appeal of OERs #1 and 2 was not timely. Also, the ABCMR stated that Plaintiff "has not presented and the records do not contain sufficient justification to conclude that it would be in the interest of justice to grant the relief requested or to excuse the failure to file within the time prescribed by law." S.A. at 127. As to the 1990 OER, the ABCMR similarly determined that Plaintiff "has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice." S.A. at 141.

Appendix A

After Plaintiff exhausted his administrative appeals, he filed the instant action in the United States District Court for the Eastern District of North Carolina on November 14, 1994. He alleges three causes of action in his complaint: (1) employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-16; (2) violation of the Due Process Clause of the Fifth Amendment to the United States Constitution; and (3) the Army's failure to follow its own regulations in reviewing his request for correction of military records. Plaintiff seeks to have the district court order that the adverse ratings in the three challenged OERs be upgraded or removed from his records; that he be retroactively promoted to Lieutenant Colonel with back pay; and that he be allowed to attend advanced military schools and be guaranteed an opportunity to compete for the rank of Colonel.

On January 30, 1995, Defendants filed a motion to dismiss or, in the alternative, for summary judgment. The district court granted Defendants' motion on July 3, 1995. The district court dismissed Plaintiff's Title VII claim under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, ruling that Title VII does not apply to uniformed members of the military. The district court also dismissed Plaintiff's constitutional claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The court found, *inter alia*, that Plaintiff's due process claims were nonjusticiable. Finally, the court granted summary judgment for Defendants under Fed. R. Civ. P. 56 with regard to Plaintiff's claim that the Army failed to follow its own regulations in reviewing his request to correct his military records. The court found that the ABCMR's actions were not arbitrary, capricious, or unsupported by substantial evidence.

Plaintiff appeals from the district court's order of July 3, 1995. We address each of Plaintiff's allegations of error below.

Appendix A

II.

Plaintiff's first cause of action is for alleged employment discrimination in violation of Title VII. Plaintiff, who is an African American, alleges that his unfavorable OERs were the result of improper racial discrimination. He contends that the district court erred in dismissing his discrimination claim.

This court reviews *de novo* the district court's dismissal of Plaintiff's Title VII claim for lack of subject matter jurisdiction. *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994).

Section 717 of Title VII, 42 U.S.C. § 2000e-16(a), provides, in relevant part, "All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." As the district court correctly recognized, every federal court of appeal that has addressed the issue has held that Title VII does not apply to uniformed members of the military. *E.g.*, *Roper v. Department of Army*, 832 F.2d 247, 248(2d Cir. 1987); *Gonzalez v. Department of Army*, 718 F.2d 926, 928-29 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *see also Collins v. Secretary of Navy*, 814 F. Supp. 130 (D.D.C. 1993). *But see Hill v. Beckman*, 635 F. Supp. 1228 (E.D.N.Y. 1986) (holding that uniformed service member may bring sex discrimination suit under Title VII) (rejected by *Roper, supra*). Those courts have recognized the difference between the definition of the term "military departments" as used in 42 U.S.C. § 2000e-16 and the term "armed forces." Under this distinction, the term "military departments" includes only civilian employees of the Army, Navy, or Air Force; while the term "armed forces" refers to

uniformed military personnel.[4] *Gonzalez*, 718 F.2d at 928. The court in *Gonzalez* reasoned that Congress recognized the difference between the two terms when it drafted section 717 to apply specifically to "military departments." The *Gonzalez* court found support for its interpretation of section 717 in the legislative history of the statute. *Id.*

This court agrees that Congress intended to include only civilian employees of the military departments, and not uniformed service members, within the reach of Title VII. Therefore, the district court was correct in dismissing this count of Plaintiff's complaint under Fed. R. Civ. P. 12(b)(1) for want of subject matter jurisdiction.

III.

Plaintiff's second cause of action is for violation of his Fifth Amendment right to due process. The district court dismissed this cause of action under Fed. R. Civ. P. 12(b)(6), ruling that the allegations presented a nonjusticiable issue.

We review a dismissal under Rule 12(b)(6) *de novo*, construing the factual allegations in the light most favorable to

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4. Section 102 of Title 5 of the United States Code, which is specifically referenced in 42 U.S.C. § 2000e-16, provides that "[t]he military departments are: The Department of the Army[;] The Department of the Navy[; and] The Department of the Air Force." 5 U.S.C. § 102. Section101(a)(8) of Title 10 of the United States Code contains virtually the identical definition of the term "military departments." *See* 10 U.S.C.§ 101(a)(8). Significantly, however, 10 U.S.C. § 101 contains a separate definition of the term "armed forces," which is defined to mean "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 10 U.S.C. § 101(a)(4).

the plaintiff. *Biggs v. Meadows*, 66 F.3d 56, 59 (4th Cir. 1995). "Dismissal for failure to state a claim is proper where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Id.* (quoting *Hinshon v. King & Spalding*, 467 U.S. 69, 73(1984)).

The district court construed Plaintiff's complaint as alleging a cause of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court held that a plaintiff could sue federal officers individually for damages caused by constitutional torts committed under color of their authority. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994).

We have some serious reservations about whether the district court should have implied a *Bivens* action from the allegations in Plaintiff's complaint. Although Fed. R. Civ. P. 8(c) provides that "[a]ll pleadings shall be so construed as to do substantial justice," this court has imposed a heightened pleading requirement for plaintiffs asserting actions against federal officials under *Bivens*. *See Dunbar Corp. v. Lindsey*, 905 F.2d 754, 764 (4th Cir. 1990) ("We agree . . . that a 'heightened pleading standard' is highly appropriate in actions against government officials."). The allegations in Plaintiff's complaint likely do not contain the requisite specificity to be appropriately reviewed as a *Bivens* action.

Nevertheless, we agree with the district court's ultimate conclusion that Plaintiff cannot recover under *Bivens* for the alleged due process violations of Defendants. In *Chappell v. Wallace*, 462 U.S. 296 (1983), the Supreme Court specifically held that "enlisted military personnel may not maintain a suit to

recover damages from a superior officer for alleged constitutional violations." *Id.* at 305. The *Chappell* Court determined that the unique disciplinary structure of the military and Congress's plenary authority over the armed forces presented "special factors counselling hesitation' " to allowing a *Bivens*-type action by servicemen against their superiors. *Id.* at 298, 304 (quoting *Bivens*, 403 U.S. at 396)). The Court noted that Congress has provided specific remedies for complaints and grievances of servicemen, such as applying to the boards for the correction of military records under 10 U.S.C. § 1552(a).

Although the specific language of *Chappell* prohibits suits by enlisted service members against their superior officers, the Supreme Court in *United States v. Stanley*, 483 U.S. 669 (1987), specifically held that "no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to service.'" *Id.* at 684 (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)); *see also Mickens v. United States*, 760 F.2d 539, 540 (4th Cir. 1985) (per curiam) (holding that the rationale of *Chappell* bars a *Bivens*-type suit brought by a subordinate officer against a superior officer), *cert. denied*, 474 U.S. 1104 (1986).

This court agrees with the district court's determination that Plaintiff's allegations "arise out of or are in the course of activity incident to service." Therefore, the district court was correct in dismissing Plaintiff's due process cause of action for failure to state a claim.[5]

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5. We do not reach the district court's alternative ruling that Plaintiff cannot demonstrate a property interest in a military promotion or continued military service, or a liberty interest in preserving his good name and reputation. *See, e.g., Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir.1983) ("[I]t is clear that military promotion decisions *simpliciter* are not susceptible

(Cont'd)

IV.

Before reaching the merits of Plaintiff's appeal as to the remaining cause of action, we must address the issue of jurisdiction, both in the district court and in this court. It is well settled that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1675 (1994). Although neither party has challenged the jurisdiction of this court or the district court, the Supreme Court has stated that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). The court's concern about jurisdiction in this case stems primarily from the district court's failure to address the issue of sovereign immunity.[6]

(Cont'd)

to due process challenges, inasmuch as there exists no property or liberty interest in a military promotion *per se*."); *Sims v. Fox*, 505 F.2d 857, 860-64 (5th Cir. 1974) (en banc) (holding that serviceman failed to demonstrate property or liberty interest in challenging his discharge from Air Force), *cert. denied*, 421 U.S. 1011 (1975).

6. Plaintiff's cause of action under Title VII, were it viable, would not present the same concerns of sovereign immunity, because 42 U.S.C. § 2000e-16 contains an express waiver of sovereign immunity for actions covered by the statute. *E.g., Salazar v. Heckler*, 787 F.2d 527 (10th Cir.1986) (stating that 42 U.S.C. § 2000e-16(c) is a clear expression of consent to suit against the United States by federal employees covered by subsection (a)).

As the Supreme Court has recognized, "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Furthermore, "a waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

Here, the district court rejected the only basis for jurisdiction alleged in Plaintiff's complaint: the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The district court examined Plaintiff's allegations and inferred jurisdiction under the general federal question jurisdiction statute, 28 U.S.C. § 1331.[7] However, section 1331 "is not a general waiver of sovereign immunity. It merely establishes a subject matter that is with in the competence of federal courts to entertain." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 4 (1st Cir. 1989) (citation omitted); *Humphreys v. United States*, 62 F.3d 667 (5th Cir. 1995) (holding that 28 U.S.C. § 1331, by granting district courts jurisdiction over constitutional claims, does not thereby waive sovereign immunity).

The district court's analysis of Plaintiff's case under *Bivens, supra*, is also not sufficient to remove the concern of sovereign immunity. *Bivens* did not abolish the doctrine of sovereign immunity of the United States. Any remedy under *Bivens* is against federal officials individually, not the federal government. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994).

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7. Section 1331 provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Generally, plaintiffs in cases such as this one, challenging a decision of a board for the correction of military records, have used one of two avenues to establish federal jurisdiction: the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491; and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. Both of these statutes have been construed as waivers by the United States of sovereign immunity. *E.g., United States v. Mitchell*, 463 U.S. at 212 ("[W]e conclude that by giving the Court of [Federal] Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims."); *Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988) ("[I]t is undisputed that the 1976 amendment to [5 U.S.C.] § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment. . . .").

As noted earlier, Plaintiff's complaint invokes the Little Tucker Act, 28 U.S.C. § 1346(a)(2), as the sole basis for jurisdiction in this case. J.A. at 7. We have recognized that Fed. R. Civ. P. 8(a)(1) requires plaintiffs to affirmatively plead the jurisdiction of the federal court. *Dracos v. Hellenic Lines, Ltd.*, 762 F.2d 348, 350 (4th Cir.), *cert. denied*, 474 U.S. 945 (1985). However, Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." As the United States Court of Appeals for the Tenth Circuit has stated, "Although a plaintiff must allege essential jurisdictional facts in a complaint, federal jurisdiction may be sustained on the basis of a statute not relied on or alleged in the pleadings." *Celli v. Shoell*, 40 F.3d 324, 328 (10th Cir. 1994). Thus, if the allegations in Plaintiff's complaint are sufficient to support jurisdiction under a provision other than the Tucker Act, such as the APA, this court is authorized to examine the case under that provision.

The interplay between the Tucker Act and the APA is some what complicated and raises some significant issues of federal court jurisdiction. Determining the proper statutory framework for the district court's jurisdiction in this case is critical because it affects the appellate jurisdiction of this court. The United States Court of Appeals for the Federal Circuit, not the regional courts of appeals, has exclusive jurisdiction over appeals in cases based "in whole or in part" on the Tucker Act. 28 U.S.C. § 1295(a)(2). The provision of 28 U.S.C. § 1295(a)(2) is mandatory and cannot be waived by the parties, because it relates to the subject matter jurisdiction of this court. *Trayco, Inc. v. United States,* 967 F.2d 97, 100 (4th Cir. 1992). Accordingly, if Plaintiff's action were properly before the district court under the Little Tucker Act, the appeal therefrom would have to go to the Federal Circuit, not to this court.

In addition, this court is cautious about trespassing into the province of the Court of Federal Claims and the Federal Circuit to decide non-tort actions against the United States. As the United States Court of Appeals for the D.C. Circuit has recognized, "a primary purpose of the [Tucker] Act [is] to ensure that a central judicial body adjudicates most claims against the United States Treasury." *Kidwell v. Department of Army*, 56 F.3d 279, 284 (D.C. Cir. 1995) (citing *United States v. Hohri,* 482 U.S. 64, 71-73 (1987)). The Court of Federal Claims and the Court of Appeals for the Federal Circuit have "extensive experience reviewing decisions of corrections boards in military pay cases." *Mitchell v. United States,* 930 F.2d 893, 896 (Fed. Cir. 1991). With these basic principles in mind, we turn our analysis to whether the Tucker Act or the APA provides the appropriate jurisdictional foundation for this case.

Appendix A

A.

The APA generally provides that a person who claims to have suffered a legal wrong because of agency action is entitled to judicial review of that action. 5 U.S.C. § 702. The waiver of sovereign immunity in the APA is limited to suits seeking relief "other than money damages." *Id.* In addition, review under the APA is available only for "final agency action *for which there is no other adequate remedy in a court.*" 5 U.S.C. § 704 (emphasis added). This limitation has been interpreted to preclude review under the APA when a plaintiff has an adequate remedy by suit under the Tucker Act. *See, e.g., Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976) ("Section 704 of the APA provides that judicial review is inappropriate where there exists some other adequate remedy in a court, and the availability of a remedy in the Court of Claims under the Tucker Act has been held to be an adequate remedy."); *see also Bowen v. Massachusetts*, 487 U.S. 879, 901 n.31 (1988) ("[S]uits under the Tucker Act in the Claims Court offer precisely the sort of special and adequate review procedures' that § 704 requires to direct litigation away from the district courts."). Therefore, to determine whether Plaintiff's suit is cognizable under the APA, the court must first examine whether he has an available remedy under the Tucker Act.

The Tucker Act actually consists of two parts: 28 U.S.C. § 1491, and 28 U.S.C. § 1346(a)(2), which is commonly known as the "Little Tucker Act." The Tucker Act grants jurisdiction to the United States Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. The

Little Tucker Act makes the jurisdiction of the Court of Federal Claims concurrent with the district court for civil actions or claims against the United States for $10,000 or less. 28 U.S.C. § 1346(a)(2). If a plaintiff's claim is for more than $10,000, he must bring the action in the Court of Federal Claims.[8] *See United States v. Hohri*, 482 U.S. 64, 67 n.1 (1987).

The district court rejected Plaintiff's use of the Tucker Act to establish jurisdiction in this case, because the court concluded that his claims were primarily for equitable relief. J.A. at 83. The court determined that Plaintiff's claim for money damages in the form of backpay was merely subordinate to his equitable claims. Although the actual language of the Tucker Act does not specifically prohibit the Court of Federal Claims from issuing injunctive relief, the United States Supreme Court has recognized, as a general rule, that "the Court of [Federal] Claims has no power to grant equitable relief." *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam). The Tucker Act does, however, authorize courts to award injunctive relief in limited circumstances, when such relief is necessary to provide an entire remedy and when the injunction is "an incident of and collateral to" an award of monetary relief. 28 U.S.C. § 1491(a)(2).[9]

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8. It is not clear from Plaintiff's complaint whether this case would satisfy the jurisdictional amount requirement of 28 U.S.C. § 1346(a)(2), because the complaint contains no prayer for a specific amount of monetary damages. A plaintiff can waive damages in excess of $10,000 to remain in district court, *see, e.g., Hahn v. United States*, 757 F.2d 581, 587 (3d Cir. 1985); however, there is no indication that Plaintiff has done so here.

9. The relevant portion of the statute provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident

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The district court is correct in its assessment that Plaintiff's claim for injunctive relief is the essence of his complaint. The injunctive relief requested by Plaintiff would not be available under the Tucker Act because it would not be an incident of, or collateral to, a monetary award. *See Adkins v. United States*, 68 F.3d 1317, 1324 n.9 (Fed. Cir. 1995) ("[T]he Court of Federal Claims was without authority [under the Tucker Act] to direct the Secretary [of the Army] to promote [plaintiff] to the rank of colonel because such relief would not be subordinate or collateral to a monetary award."). Indeed, Plaintiff's claim for back pay[10] would only arise if Plaintiff's request for retroactive promotion were granted.

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> of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

28 U.S.C. § 1491(a)(2). This language authorizing injunctive relief in limited circumstances does not appear in the Little Tucker Act; however, it is generally recognized that district courts have authority under the Mandamus Statute, 28 U.S.C. § 1361, to order the same type of injunctive relief as the Court of Federal Claims. *See* 1 Moore's Federal Practice ¶ 0.65[2.-3], at 700.111; *see also Richardson v. Morris*, 409 U.S. at 466 ("[T]he Tucker Act did no more than authorize the District Court to sit as a court of claims . . . .' ") (quoting *United States v. Sherwood*, 312 U.S. 584, 591 (1941)).

10. There is considerable uncertainty about whether an award of back pay is considered money damages or a form of equitable relief for purposes

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This case is different from a case where the plaintiff brings an action to review the decision of a board for the correction of military appeals *after* he has already been discharged from the service. *See, e.g., Sanders v. United States*, 594 F.2d 804, 810 & n.10 (Ct. Cl. 1979) (en banc). In such a case, a successful plaintiff has a cause of action for back pay from the date of his discharge to the date of the court's determination. *See id.* Here, by contrast, Plaintiff has no present claim for back pay because he is still serving in the Army without a loss of his position or pay.

The district court would have no authority to order the Secretary of the Army to promote Plaintiff to Lieutenant Colonel. As the United States Court of Appeals for the Federal Circuit recently recognized in a case factually similar to the instant case, a plaintiff's "prayer that the Court of Federal Claims direct the Secretary to promote him to the rank of colonel plainly was a request for impermissible 'interfer[ence] with legitimate Army matters.' Courts will not interject themselves into the promotion process." *Adkins*, 68 F.3d at 1324 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)); *see also Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir.) ("This is like thousands of other routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or the jurisdiction of the courts to wrestle with."), *cert. denied*, 488 U.S. (1988). The only possible relief that

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of determining whether such claims are cognizable under either the APA or the Tucker Act. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court stated that "an order providing for the reinstatement of an employee with backpay" is a form of equitable relief, not damages at law. *Id.* at 893. In *Ulmet v. United States*, 888 F.2d 1028 (4th Cir. 1989), this court arguably adopted the *Bowen* Court's dictum and stated that an action for back pay was not exclusively within the Tucker Act. *Id.* at 1030-31.

Plaintiff could get in this case would be for the district court to order that Plaintiff's military records be corrected and to remand the case for another review in due course by the appropriate promotion selection board. Because Plaintiff cannot receive a court-ordered retroactive promotion, there is no basis for back pay in this case and, therefore, no monetary damages on which to premise jurisdiction under the Tucker Act. Accordingly, the district court correctly concluded that the Tucker Act does not apply in this case. Since Plaintiff has no other adequate remedy in a court, review of his case is proper under the APA.

B.

Although the district court did not adequately articulate the basis for its jurisdiction in this case, it correctly analyzed the merits of Plaintiff's final cause of action. The district court granted summary judgment for Defendants on Plaintiff's claim that the Army failed to follow its own regulations in reviewing his request for correction of his military records.

We review a grant of summary judgment *de novo*, employing the same standards used by the district court. *Swanson v. Faulkner,* 55 F.3d 956, 964 (4th Cir.), *cert. denied*, 116 S. Ct. 417 (1995).

The district court's review of the ABCMR's decision is quite limited. As the district court properly recognized, such decisions can beset aside only "if they are arbitrary, capricious, or not based on substantial evidence." *Chappell v. Wallace*, 462 U.S. 296, 303 (1983); *Robbins v. United States*, 29 Fed. Cl. 717, 725 (1993) ("The function of the court is not to reweigh the evidence presented to the ABCMR. Rather, the court is charged with determining whether the conclusion being reviewed is supported

by substantial evidence.") (quoting *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983)).

After carefully reviewing Plaintiff's allegations and the record below, we agree with the district court's ruling that the facts, taken in the light most favorable to Plaintiff, cannot support a finding that the ABCMR acted arbitrarily or capriciously, or without substantial evidentiary support, in denying Plaintiff's requests. Therefore, we determine that the district court was correct in granting Defendants' motion for summary judgment as to Plaintiff's third cause of action.

V.

For all of the foregoing reasons, the order of the district court granting Defendants' motion to dismiss or, in the alternative, for summary judgment, is hereby

AFFIRMED.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED JULY 3, 1995

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:94-CV-866-D1

MAJOR WILLIE C. RANDALL,

Plaintiff

vs.

THE UNITED STATES OF AMERICA, THE UNITED STATES ARMY, TOGO D. WEST, JR., SECRETARY OF THE ARMY; DAVID R. KINNEER, EXECUTIVE SECRETARY, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS; DEPUTY CHIEF APPEALS AND CORRECTIONS BRANCH; OFFICERS SPECIAL REVIEW BOARD; COLONEL REINHARD M. LOTZ; COLONEL STEPHEN GARRET; AND LIEUTENANT COLONEL ORA J. WILLIAMS,

Defendants

MEMORANDUM OF DECISION

Plaintiff, Major Willie C. Randall, filed this action against the United States Army, *et al.*, on November 14, 1994 alleging, *inter alia,* employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16, along with several constitutional violations. The claims stem from the Army's decision not to promote plaintiff to Lieutenant Colonel. Plaintiff seeks damages for lost wages and equitable relief through a retroactive promotion and a guaranteed chance

to compete for future promotions. Defendants have moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment.

Construed most favorably to the plaintiff, the facts alleged are as follows: plaintiff, a Fayetteville, North Carolina, resident, reported for active duty with the United States Army on or about August 29, 1976, when he was promoted to First Lieutenant after serving as a Reserve commissioned officer. After promotions to Captain, on September 15, 1980, and to Major, on January 1, 1988, plaintiff anticipated a promotion to Lieutenant Colonel.

In a May 16, 1991 letter from Lieutenant Colonel James M. Colvin, Chief of the Quartermaster's Branch of the U.S. Army, plaintiff learned that in Part VIIa of his 1990 Officer Evaluation Report (OER), a senior rater (evaluator) had rated his potential "below average" as compared to that of his contemporaries.[1] According to Colvin, "a continuation in this direction may have a serious impact on [plaintiff's] potential for promotion." Plaintiff then reviewed his military records in the Quartermaster Branch on July 31, 1991 and found two similar OERs, although each lauded his performance during the rating period. Plaintiff appealed the ratings to the Deputy Chief of Staff for personnel of the Officer Special Review Board (OSRB), seeking to upgrade or expunge his ratings.

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1. For convenience, plaintiff's "three block" will be termed "below average" — his "potential" score fell below the average "potential" of his contemporaries, even though the score appears in the top thrid of a nine-block scale.

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No reports were referred to plaintiff because the senior rater did not consider them adverse to plaintiff's career.[2] Plaintiff and defendants differ on whether these below-average marks constitute an "adverse report" as defined in Army regulations.

In considering plaintiff's appeal, the OSRB contacted the rater and senior rater who prepared plaintiff's third OER.[3] The rater said plaintiff's below-average rating resulted from a disagreement between plaintiff and the senior rater on how to execute their commander's intent on a Gulf War deployment. The senior rater described plaintiff as a "loose cannon on deck," and he said plaintiff's inability to follow guidance or to keep his supervisor informed justified the rating. The OSRB denied plaintiff's appeal, noting that Part VIIa evaluates potential, not performance, and the board found that plaintiff failed to provide "clear and convincing evidence" that the OER was inaccurate or unjust. Plaintiff learned the results of his appeals on May 1, 1992. On August 6, 1992, the Lieutenant Colonel selection board declined to promote plaintiff.

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2. Department of the Army, Reg. 623-105, Officer Evaluation Reporting System, Ch. 4 (31 March 1992), hereinafter AR 623-105, instructs that any report with a senior rater "potential" evaluation in one of the bottom three [of nine] blocks of part VIIa or any report with ratings or comments that, in the opinion of the senior rater, are so derogatory that the report may have an adverse impact on the rated officer's career, will be referred to the rated officer by the senior rater for acknowledgment and comment before it is sent to the Department of the Army.

3. AR 623-105 authorizes the OSRB to get information from an appellant, rating officials, persons in the chain of command, or anyone thought to have firsthand knowledge of a case, and the Board will contact the appellant only if deemed necessary.

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Plaintiff appealed each OER to the Army Board for the Correction of Military Records (ABCMR), again seeking changes in his Part VIIa ratings. He argued that the ratings contradicted favorable OER comments from the senior rater, and he submitted newspaper clippings and officer statements, both praising his work. The ABCMR denied plaintiff relief for the first two OERs, finding them untimely.[4] It concluded that the third OER comported with regulations, that plaintiff failed to show that he should have received the OER and that plaintiff could only speculate that the OER prevented his promotion; thus, the ABCMR denied plaintiff relief for the third OER.

After exhausting his administrative remedies with the ABCMR, plaintiff initiated the instant action. Plaintiff first alleges that his evaluators discriminated against him in preparing their OERs, and he seeks recovery under Title VII of the Civil Rights Act, 42 U.S.C. §2000(e)-16. He also alleges that the OSRB denied him procedural due process by not referring his OERs to him and by not apprising him of subsequent deliberations about his case. He alleges further that the Army violated its regulations in reviewing his case. Defendant has moved to dismiss all counts for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, for summary judgment under Fed. R. Civ. P. 56.

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4. 10 U.S.C. §1552(b) requires that applications for the correction of military records be filed before October 26, 1961, or within 3 years after discovery of the alleged error or injustice, whichever is later. ABCMR found that the plaintiff should have discovered the alleged errors in 1983.

Appendix B

Threshold Jurisdictional Issues

The court's jurisdiction is limited by the Constitution and by federal statues. *See Palmore v. United States*, 411 U.S. 389, 401 (1973); *Soriano v. United States*, 352 U.S. 270, 273 (1957). Plaintiff's complaint must be dismissed if it fails to show that the court has the statutory and constitutional competence to hear his claims. 4 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1206 (1990).

Plaintiff asserts jurisdiction first under 28 U.S.C. §1346(a)(2), part of the Tucker Act, which gives the district courts original jurisdiction over:

> [a] civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. 1346(a)(2).

The rule, however, is that the Tucker Act authorizes only actions for money damages, not suits for equitable relief, against the United States. *Richardson v. Morris*, 409 U.S. 464 (1973). The Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *Dehne v. United States*, 970 F.2d 890, 893 (Fed. Cir 1992) (holding applied to Air Force Major challenging his nonpromotion); *United States v. Testan*, 424 U.S. 392 (1976).

The district court may grant equitable relief only rarely, when such relief is incident to a claim for money damages. *See Cook v. Arentzen,* 582 F.2d 870, 878 (4th Cir. 1978). Here, plaintiff's equitable relief claims rule his complaint. They are not subordinate to his single claim for back-pay damages. Moreover, plaintiff cannot collect back pay without a court-impelled promotion. Thus, his defective use of the Tucker Act, without more, would let the court hear only his damages claim.

Plaintiff proffers a second conduit for federal jurisdiction, the supplemental jurisdiction statue, which reads:

> Except as provided in subsection (b) and (c) or *as expressly provided otherwise by Federal statute,* in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States.

28 U.S.C. § 1367(a) (emphasis added).

Plaintiff apparently invokes Section 1367(a) as a jurisdictional magnet, one to allow the court to hear federal claims *over which it has no independent jurisdictional basis* by simply attaching them to some viable claim. For example, the court lacks jurisdiction to hear plaintiff's Title VII claim, *see infra,* yet assuming the court may hear one of plaintiff's claims, such as his constitutional claim, plaintiff wants to persuade the court to entertain the remaining nonviable claims anyway. This

is not the law. In invoking jurisdiction, plaintiff cannot do indirectly what he cannot do directly. He cannot plead for the court's relief for additional claims outside its statutory reach because such maneuvers "flout the Congressional command." *Owen Equipment and Erection Company v. Kroger,* 437 U.S. 365, 377 (1978) (plaintiff could not defeat statutory "complete diversity" requirement merely by suing only diverse defendants and waiting for them to implead nondiverse defendants).

Further, a Title VII claim, in this context, simply is not "ancillary" to a claim of denied procedural due process — its outcome does not logically depend on the outcome of the due process claim, and its merits can be assessed independently. *Id.* at 376. Neither convenience nor judicial economy justify extending supplemental jurisdiction to the Title VII claim, even if Congress had not barred it initially. Therefore, plaintiff's only viable claims are those asserting an independent jurisdictional basis; no merit exists for casting the judicial net further. The supplemental jurisdiction statute standing alone fails to invoke the court's jurisdiction over the totality of plaintiff's claims.

The court concludes that plaintiff's use of the Tucker Act and the supplemental jurisdiction statute do not suffice to invoke the court's jurisdiction. However, technical malfeasance will not destroy his case because the court can fairly infer the jurisdiction of the federal courts from the facts stated into the pleadings.

The Federal Rules of Civil Procedure require that pleadings be judged by their substance, not by technicalities; when justice so requires, courts will interpret pleadings in favor of the pleader and look for legally cognizable claims within them. 5 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1286 (1990). The Supreme Court has ruled that

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"[w]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States . . . the federal court must entertain the suit" unless the alleged claim "clearly appears to be immaterial" or where it is "wholly insubstantial and frivolous." *Bell v. Hood,* 327 U.S. 678, 681-683 (1946). Therefore, final dismissals should be granted rarely under the *Hood* rule. Even bad claims are generally to be dismissed for failure to state a claim upon which relief can be granted rather than for want of jurisdiction. Charles Write, *Law of Federal Courts,* 31 (5th ed. 1994).

The court finds plaintiff's claim here is not patently frivolous. The complaint sketches a colorable constitutional claim under the Fifth Amendment. Plaintiff alleges a denial of procedural due process committed by the U.S. Army, and one can fairly construe an implicated liberty interest from plaintiff's nonpromotion. Plaintiff also challenges specific Army regulations sufficient to suggest this court's jurisdiction. Therefore, any dismissal should rest on the merits.

The general federal question statute gives the court original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and the court will *sua sponte* assume jurisdiction over plaintiff's procedural due process claim and his administrative law claim. Plaintiff's Title VII claim, however, affords him no jurisdictional relief. Even assuming that plaintiff's claim is adequate the weight of authority in Circuits considering the issue holds that uniformed members of the armed services cannot recover under Title VII. *Doe v. Garrett,* 903 F.2d 1455, 1458-61 (11th Cir. 1990), *cert. denied,* 499 U.S. 904 (1990). Although the statute protects "military departments," courts have uniformly held that only civilian armed services employees, not uniformed personnel, lie

within its scope. *Gonzalez v. Department of the Army,* 718 F.2d 926, 928-929 (9th Cir. 1983). *Accord Roper v. Department of the Army,* 832 F.2d 247, 248 (2nd Cir. 1987); *Johnson v. Alexander,* 572 F.2d 1219 (8th Cir. 1978), *cert. denied,* 439 U.S. 986 (1978), *reh'g. denied,* 439 U.S. 1135 (1979); *Collins v. Secretary of the Navy,* 814 F.Supp 130 (D.D.C. 1993). *But see Hill v. Berkman,* 635 F.Supp. 1228 (E.D.N.Y. 1986) (discredited in *Roper*). Although the Fourth Circuit has not squarely addressed the issue, the other circuits have overwhelmingly denied relief, and plaintiff's Title VII claim must therefore be dismissed for want of subject matter jurisdiction.

Plaintiff's jurisdictional thicket yields only two viable claims for relief. The court finds the Fifth Amendment procedural due process claim and the claim that the Army failed to follow regulations both invoke general federal question jurisdiction, while the others fail for lack of jurisdiction.

Plaintiff's Procedural Due Process Claim

Plaintiff seeks back pay he would have received with a promotion to Lieutenant Colonel. He also seeks equitable relief — either a promotion to Lieutenant Colonel or the alteration or expungement of ratings in three OERs. Plaintiff also requests the opportunity to attend advanced military schools and compete for the rank of Colonel. The court finds that these claims for relief are nonjusticiable and must be dismissed for failing to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6).

On a motion to dismiss, the court reviews the sufficiency of the complaint or motion, without consideration of affidavits, exhibits, or admissions. *Scheuer v. Rhodes,* 416 U.S. 232, 236

(1974). Rule 12 requires that a motion to dismiss be viewed in the light most favorable to the plaintiff. *Revene v. Charles County Commissioners*, 882 F.2d 870, 872 (4th Cir. 1989). However, a dismissal is proper if it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the plaintiff's allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A. *Plaintiff cannot collect damages for constitutional injury.*

Armed forces personnel cannot collect money damages from superior officers who violate their constitutional rights when the injury arises out of or is incident to military service. *United States v. Stanley*, 483 U.S. 669 (1987). When individuals bring a constitutional claim against federal officials, generally a cause of action for damages emerges directly under the Constitution, even when Congress has not authorized such suits. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment violations by federal agents acting under color of their authority gave rise to a cause of action for damages); *see also Davis v. Passman*, 442 U.S. 228 (1979) (holding that an action for damages could be brought directly under the Fifth Amendment Due Process clause). However, the Supreme Court has held that military personnel will have no *Bivens*-type remedy against their superior officers because "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell v. Wallace*, 462 U.S. 296 (1983). *Stanley*, in dictum, suggested that the "special factors counseling hesitation" in *Chappell* required abstention from *Bivens*-type remedies whenever the injury fulfilled the "incident to military service"

test. *Stanley,* 483 U.S. at 683. Plaintiff here is a United States Army officer with a claim directly under the Fifth Amendment to the Constitution. Potential defendants include the United States, the United States Army, the Executive Secretary of the Army Board for Correction of Military Records, the Officers' Special Review Board and various superior officers. Although not all of the defendants are within plaintiff's "chain of command," that fact is not controlling in the disposition of a *Bivens* action emphasis on the officer/ subordinate relationship is overshadowed by the "special factors"/ "incident to service" analysis the Supreme Court adopted in *Chappell* and *Stanley. Id.* at 680. Therefore, plaintiff's suit against parties other than superior officers within his chain of command does not foreclose the *Chappell/Stanley* analysis.

Assuming *arguendo* that plaintiff has a valid constitutional claim, to receive a *Bivens*-type remedy, he must show that his injury did not arise out of or was not incident to military service. The Supreme Court has advocated a broad reading of the "incident to military service" test, expanding its rubric to comprise even civilian tortfeasors. *See United States v. Johnson* 481 U.S. 681 (1987), *Chappell,* 462 U.S. at 299. The *Feres* doctrine has stood for forty years for a broad application of the "incident to military service" test. *Feres v. United States,* 340 U.S. 135 (1950) (holding that uniformed military personnel cannot collect on suits stemming from service-related injuries under the Federal Tort Claims Act); *Johnson,* 481 U.S. at 686, 687. Since plaintiff's alleged injury builds directly from his superior officers' personnel decisions, such an injury could only occur incident to military service. Thus, the court finds that the challenged OERs occurred incident to plaintiff's military service, and such injuries compel no remedy for money damages.

Appendix B

B. *Plaintiff's Claims for Equitable Relief are Nonjusticiable*

Issues within the court's jurisdiction are not always within its power to grant relief. Issues also must be justiciable, which means that the court must be competent to consider them. Justiciability, unlike jurisdiction, depends on "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr,* 369 U.S. 186, 198 (1962).

Fourth Circuit courts generally defer to military authorities in determining whether suits against the military are justiciable. The Court of Appeals has crafted a two-step analysis to help federal courts determine when internal military affairs should be reviewed. At the threshold, a court should withhold review "in the absence of (1) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (2) exhaustion of available intraservice corrective measures." *Williams v. Wilson,* 762 F.2d 357 (4th Cir. 1985) (incorporating the two-step analysis from *Mindes v. Seaman,* 453 F.2d 197 (5th Cir. 1971)). If the threshold requirements are met, the court should then balance four policy considerations in assessing the claim's justiciability: "(1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; (4) the extent to which the exercise of military expertise or discretion is involved." *Id.* at 359.

Plaintiff successfully meets the threshold requirements; his colorable allegations of procedural due process and Army regulations violations, coupled with his exhaustion of agency

action, surpasses the standard. However, the remaining balancing test affords plaintiff no relief in its four-part analysis.

The first *Mindes* policy factor is the nature and strength of plaintiff's challenge to the military determination. *Mindes,* 453 F.2d at 201-02. Plaintiff's constitutional challenge is a procedural due process claim under the Fifth Amendment. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319 (1976). Plaintiff must show he possesses one of these interests to bring a successful procedural due process claim.

The Supreme Court has held that property interests "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). A property right does not emerge from a "mere subjective expectancy." *Perry v. Sindermann,* 408 U.S. 593, 603 (1972). The Circuits generally agree that there is no property interest in a military promotion unless it is attached to a statute, regulation or contract. *Blevins v. Orr,* 721 F.2d 1419, 1421 (D.C. Cir. 1983). *See also Reaves v. Ainsworth,* 219 U.S. 296, 306 (1911); *Knehans v. Alexander,* 566 F.2d 312, 314 (D.C. Cir. 1977), *cert. denied* 435 U.S. 995 (1978); *Pauls v. Secretary of the Air Force,* 457 F.2d 294, 297 (1st Cir. 1972) (military officers "have no constitutional right to be promoted or retained in service."), *Sims v. Fox,* 505 F.2d 857, 860-62 (5th Cir. 1974) (en banc), *cert. denied,* 421 U.S. 1011 (1975).

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Plaintiff seeks relief from an alleged incorrect OER through a promotion to Lieutenant Colonel. His complaint pinpoints no protected property interest violated by the government; he cites no statute or other source of law that creates an entitlement. Since the weight of authority overwhelmingly suggests that plaintiff has no property interest in a promotion, the court concludes that plaintiff can offer no evidence of a protected property interest. A liberty interest, viewed through due process lens, includes an individual's right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572. Liberty encompasses the idea that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). Liberty interests include reputational interests in gaining future employment in cases where discharge or termination of a government employee happens for false and stigmatizing reasons. *See Doe v. Garrett,* 903 F.2d 1455, 1462 (1990). However, the falsity of the government's asserted basis for the challenged employment decision is critical in proving a deprivation of the reputational liberty interest. *Id.* at 1463.

Plaintiff fails to assert any protected liberty interest. Arguably, the denial of a promotion would stigmatize any military officer's honor, reputation or integrity, although presumably not to the degree of a discharge. Plaintiff, however, makes no assertions that either his below-average scores or his senior rater's evidence supporting the marks were based on false information, and moreover, the senior rater provides substantial unrebutted contrary evidence.

Further, even if some tenuous theory of a liberty or property interest can be mined from the pleadings, the nexus between this *arguendo* deprivation and corresponding government action is to attenuated to warrant judicial infringement on the military's administrative authority. Plaintiff argues his nonpromotion stemmed from his three-block rating in his 1992 OER. Plaintiff, however, offers only mere speculation that this rating caused his nonpromotion. Moreover, the two other below-average OERs in 1982 and 1983 did not block his promotion from Captain to Major, yet he offers no explanation why it should do so now. In fact, plaintiff proves too much — the abundance of evidence he submitted to the ABCMR in *support* of his past performance seems to suggest that a three-block rating should have little impact on the Lieutenant Colonel Promotion Board's decision in his case, given the surfeit of alternative evidence. Thus, plaintiff's challenge finds little support in the *Wilson/Mindes* analysis.

The second policy question, which is potential injury to the plaintiff if review is refused, appears to militate against justiciability. Plaintiff's loss appears mostly economic in that he does not receive the additional pay of the higher rank, but the case law has made clear that such pay is not an entitlement. However, plaintiff describes his new position in the Army's Special Operations Command as a Lieutenant Colonel's position, presumably an equipollent post with similar responsibilities. He has not been discharged, nor has he been denied future advancement. Since there is doubt that plaintiff will receive extensive injuries if the court declines review, the second *Mindes* policy consideration weighs against him. Even if it did not, the remaining *Mindes* considerations still sufficiently caution against review. The third and fourth policy considerations implicated under the *Mindes* analysis are the type and degree of anticipated

interference with the military function and the extent of military discretion in this arena. Federal courts have rarely interfered with the military's discretion in personnel matters. *See Gilligan v. Morgan*, 413 U.S. 1 (1973), *Orloff v. Willoughby*, 345 U.S. 83 (1953), *reh'g. denied*, 345 U.S. 931 (1953); *Guerra v. Scruggs*, 942 F.2d 270, 275 (4th Cir. 1991). The Framers of the Constitution vested Congress with plenary authority to control rights, duties, and responsibilities within the military, and the courts have hesitated to intervene in these decisions. *Chappell*, *462* U.S. at 301. As the Supreme Court discussed in *Orloff*:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

345 U.S. at 93-94.

These concerns militate against judicial intervention in military personnel decisions. If the court were to grant relief for a personnel matter, it would encroach on the plenary authority demarcated to other government branches. The military establishment requires complex and discretionary decision making outside the institutional competence of the court.

Therefore, the third and fourth policy considerations of *Mindes* counsel against finding this case justiciable.

On balance, the penumbra of traditional and widely held concerns against judicial encroachment into military affairs subsumes the limited constitutional claim plaintiff raises. Plaintiff's due process claim, then, is nonjusticiable and must be dismissed under Fed. R. Civ. P. 12(b)(6).

Plaintiff's Administrative Law Claim

Plaintiff's surviving claim is that the ABCMR violated Army regulations AR 15-185 and AR 623-105 in refusing to change his records, and thus the Board's actions violated his procedural due process under administrative law.[5] Federal courts may review claims that a military branch failed to follow its regulations, including decisions by military correction boards denying corrective action. *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); *Ballenger v. Marsh*, 708 F.2d 349, 350 (8th Cir. 1983) (criticized in Fourth Circuit on other grounds); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1037 (3rd Cir. 1981); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 859 (D.C.Cir. 1978). However, to withstand a motion to dismiss on the pleadings, plaintiffs must generally show they have exhausted available administrative remedies before the district court can entertain the suit, and that they have pleaded a constitutional violation or an allegation that the military failed to follow its procedures. *Williams*, 762 F.2d at 360, *Hodges v. Callaway*, 499 F.2d 417, 419 (5th Cir. 1974).

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5. The court finds plaintiff's assertion that the Army violated DA PAM 600-3 is untenable because it lacks further support, argument or citation.

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Plaintiff alleged that the ABCMR failed to follow its procedures in considering his appeal. He has exhausted his administrative remedies, as evidence by the ABCMR's direction that he pursue the matter in federal court. Therefore, his claim withstands the motion to dismiss for subject matter jurisdiction and the motion to dismiss for failure to state a claim upon which relief can be granted, and it must be assessed in light of defendant's motion for summary judgment.

On a motion for summary judgment, a court must grant the motion if the parties' pleadings, depositions, interrogatory answers, admissions and any affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment has the initial burden of demonstrating the absence of any material issue of fact, but need not support its motion with affidavits or other materials negating the nonmoving party's claim. *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving party may not rely upon mere allegations or denials contained in its pleadings, but must come forward with evidentiary material allowed by Rule 56 demonstrating the existence of a genuine issue of material fact requiring a trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Celotex*, 477 U.S. at 324. In other words, to withstand a motion for summary judgment, the nonmoving party must proffer sufficient evidence on which a reasonable jury could find in its favor. *Anderson*, 477 U.S. at 248. In considering the motion, the court must view the facts and inferences to be drawn from the evidence in the light most favorable to the nonmoving party to the extent those inferences are reasonable. *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587-88 (1986).

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ABCMR decisions may be set aside if they are arbitrary, capricious, or not based on substantial evidence. *See Chappell*, 462 U.S. at 303 (applying similar standard to Naval Board for the Correction of Military Records); *Hodges*, 499 F.2d at 423. In demonstrating these deficiencies, plaintiffs must "overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith," *Sanders v. United States*, 594 F.2d 804, 813 (1979), and they must establish through "cogent and clearly convincing evidence" that the ABCMR acted in an arbitrary or capricious manner unsupported by substantial evidence. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed.Cir. 1979), *cert. denied*, 479 U.S. 853 (1986).

Plaintiff first alleges that the ABCMR's refusal to forward his reconsideration request violated AR 15-185.[6] This allegation lacks merit. In AR 15-185, paragraph 10(c), we find:

> All requests for further consideration may be initially screened by the staff of the Board to determine whether any evidence or other matter (including, but not limited to any factural [sic] allegations or any arguments why the relief should be granted) has been submitted by the applicant that was not in the record at the time of any prior Board consideration. If such evidence or other matter has been submitted, the request will be forwarded to the Board for a determination in accordance with [paragraph 10(b)] above.

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6. 32 C.F.R.§ 581.3 (hereinafter AR 15-185).

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> If no such evidence or other matter has been submitted, the applicant will be informed that his/her request was not considered by the Board because it did not contain any evidence or other matter that was not in the record at the time of any previous Board consideration.

AR 15-185.

Plaintiff mistakenly posits that AR 15-185 required the Board to forward a request for further consideration. However, the regulation clearly and unequivocally gives the ABCMR staff the discretion to screen applications. Although plaintiff may dispute the sufficiency of additional materials he submitted, he cannot show that the board violated its procedure in making its determination. Since substantive conclusions about this board's procedures overstep this court's competence, *see supra*, and since plaintiff fails to detail facts sufficient to suggest the board may have acted arbitrarily, capriciously or contrary to law, this claim fails under summary judgment.

Next, plaintiff alleges that the Secretary of the Army failed to respond to his request for assistance after the ABCMR denied him relief, and that doing so violated AR 15-185. However, 10 U.S.C. § 1552 provides that the Secretary of the Army may only correct military records through the ABCMR. Therefore, plaintiff is not entitled to corrective action by the Secretary alone should his ABCMR efforts fail. The mere fact that the Executive Secretary responded to plaintiff's request, and not the Secretary himself, shall not be read as infringing a nonexistent right for plaintiff to have review by the Secretary himself. Such subterfuge will not survive a summary judgment motion.

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Next, plaintiff claims that the senior rater never counselled him about his substandard OERs, in violation of AR 623-105. This regulation requires a referral for

> [g.] Any report with a senior rater potential evaluation in one of the bottom three blocks in Part VIIa.
>
> [h.] Any report with ratings or comments that, *in the opinion of the senior rater*, are so derogatory that the report may have an adverse impact on the rated officer's career.

AR 623-105, § 4-27.

Thus, since plaintiff's rating stood in the third of nine blocks, mandatory referral was not necessary under Section 4-27(g). In other instances, the senior rater has discretion to refer reports when he considers them adverse to the rated officer's career. Plaintiff can offer no evidence supporting his claim that the senior rater should have known that his below-average rating would have harmed his promotion potential. Any such claim would necessarily assume that the rating was the basis for his nonpromotion, an assumption which is *pure speculation* on plaintiff's part, uncoupled with sufficient evidence to overcome the presumption that the military operated effectively. Thus, in essence, plaintiff argues that the senior rater *should have thought* the report was adverse, a determination far afield of this court's adjudicative responsibility.

Moreover, plaintiff gives undue weight to LTC Colvin's letter describing the potential impact of the third-block ratings. Colvin never states that plaintiff's 1990 OER would, without

future below-average ratings, have an adverse impact on his potential for promotion. He carefully states that "a continuation in this direction" would have the harmful effects that plaintiff ascribes to it. Further, in determining whether the senior rater followed the regulation, Colvin's opinion is irrelevant, while the senior rater's opinion is determinative, and in this case, dispositive. Thus, since plaintiff cannot show that the senior rater acted outside his authority, and can prove no set of facts to support his claim, his argument fails.

In sum, the court finds that the ABCMR and the United States Army did not act arbitrarily or capriciously in handling plaintiff's appeal. Since this administrative law claim is plaintiff's only claim to survive the 12(b)(6) filter, it must be dismissed under defendant's motion for summary judgment.

Conclusion

For the foregoing reasons, the court rejects plaintiff's constitutional and administrative law challenges to defendants' refusal to change his military records. Accordingly, defendants' motion to dismiss and summary judgment motion will be granted.

Judgment embodying the rulings in this memorandum will be entered.

s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

July 3, 1995.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED JULY 3, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:94-CV-866-D1

MAJOR WILLIE C. RANDALL,

Plaintiff

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants

JUDGMENT

For the reasons stated in the court's memorandum of decision of even date, it is now

ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss and motion for summary judgment are granted and the action is dismissed. Let the plaintiff pay the costs.

s/ F.T. Dupree Jr.
F.T. DUPREE JR.
UNITED STATES DISTRICT JUDGE

July 3, 1995.